

*United States Court of Appeals
for the Second Circuit*



**PETITIONER'S
REPLY BRIEF**

75-4207

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MILTON EVEREST MITCHELL, : No. 75-4207

Petitioner, : Petition for Review
: of
: Deportation Order

v. : -----x

IMMIGRATION AND NATURALIZATION SERVICE, : -----x

Respondent. : -----x

REPLY BRIEF FOR PETITIONER

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- v - :
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SERVICE, :
: Respondent.
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PETITIONER'S REPLY BRIEF

Statement

This brief is respectfully submitted by petitioner in reply to the arguments and contentions set forth in respondent's brief. By reason of the nature and thrust of respondent's contentions, petitioner has found it necessary to reply at some length to these arguments. To the extent that petitioner has found it necessary to restate some of his arguments in this reply brief, he respectfully prays the Court's indulgence.

Statement of the Case

Pursuant to Sec. 106 of the Immigration and Nationality Act, 8 U.S.C. 1105(a), this Court has been asked to review a final order of the Board of Immigration Appeals.

In that order the Board refused to remand these proceedings to the Immigration Judge, to enable petitioner Mitchell to contest deportability, which he had earlier conceded.

The discretionary relief of voluntary departure, in lieu of deportation, was also denied by reason of the claimed existence of adverse factors which allegedly outweighed factors favorable to the grant of such relief.

Petitioner asks this Court to determine whether, as stated by the Board, judicial construction of Sec. 241(a)(2) of the Act in effect precludes petitioner from establishing non-deportability on the basis of any new evidence.

Petitioner had twice moved before the Board to reopen these proceedings so as to enable this new evidence, disclosed before the Board in the motion papers, to be established in the evidentiary hearing to be held before the Immigration Judge. Petitioner also asks this Court to determine whether the stated criteria for denying voluntary departure conforms to the criteria established within the Service.

Respondent's arguments actually constitute inaccurate representations of petitioner's claims. For example, respondent argues that petitioner contends that his deportability under Sec. 241(a)(2) of the Act for entry under a false claim of citizenship should have been waived by the provisions of Sec. 241(f) of the Act. Actually, petitioner's

request for relief under Sec. 241(f) of the Act is completely dependent upon the outcome of his separate claim that granted the opportunity at a meaningful hearing he can establish his non-deportability under Sec. 241(a)(2) for entry without inspection on a false claim of citizenship.

Respondent also argues that petitioner claims an abuse of discretion in denying him voluntary departure. Actually, petitioner contends that the Service did not meet its own stated standards of criteria in determining that adverse factors outweighed factors favorable to petitioner in denying him the relief of voluntary departure.

Petitioner believes it is necessary for him to restate the actual issues in this proceeding, which have been inaccurately set forth in respondent's overly selective presentations in its opposing brief.

Restatement of Facts

Petitioner Milton Everest Mitchell is a 37 year old alien, native and citizen of Trinidad. He is the husband of a United States citizen and the father of two United States citizen children. Petitioner entered the United States in 1960, with a visitor's visa, and except for a short departure and return in 1961, had resided continuously in the United States for more than thirteen years, before going to Canada in 1974 on a week-end trip to participate in a well-known Caribbean Festival. Petitioner had never adjusted his status

under benefits available to long-term out-of-status residents; nor did he apply for immigrant status through a petition filed on his behalf by an immediate relative United States citizen.

On August 5, 1974 petitioner, without luggage and in a Canadian taxicab, presented himself for immigration inspection at Rainbow Bridge, New York, as Wesley Oliver, a citizen of the United States. The Immigration authorities doubted his claim of American citizenship during an hour-long examination, but purportedly permitted petitioner to "enter" for the purpose of keeping him under surveillance. After maintaining this surveillance for six hours, he was apprehended by the Immigration Service and immediately given a deportation hearing, under a charge that he had entered without inspection upon a false claim of citizenship. Petitioner was not represented by counsel at these proceedings. At that time he conceded deportability, although he did not mention either the initial doubts of his claim of citizenship in the hour-long pre-entry investigation to which he had been subjected or to the continuous six-hour surveillance following his purported "entry" into the United States where he was always within the port area of the entry station.

Voluntary departure in lieu of deportation was denied by the Immigration Judge and an appeal against this denial was timely filed. However, while the appeal was pending

there was merged into it a request for relief under Sec. 241(f) of the Act, pursuant to the then existing law, as it existed before the decision of Supreme Court in Reid v. INS, 420 U.S. 619(1975) and oral argument was held only on the issue of voluntary departure, with leave to submit supplemental arguments on the request for relief under Sec. 241(f) of the Act. Actually Reid was decided by the Supreme Court during the pendency of this case.

These arguments were submitted, but only as being contingent upon a separate request for the separate relief of non-deportability pursuant to the guidelines set down by the Supreme Court in Reid.

The Board denied voluntary departure, and it also rejected the proffered new evidence and arguments in support of the non-deportability issue by stating that controlling case law under Sec. 241(a)(2) of the Act precluded any possibility of establishing non-deportability from the arguably different fact pattern contained in the new evidence to be presented. Contingent relief under Sec. 241(f) of the Act was also denied because of its unavailability to persons found deportable for entry without inspection under a false citizenship claim.

Summary of Argument

Petitioner is aware that conceded deportability, under Sec. 241(a)(2) of the Act, cannot be waived under the provisions of Sec. 241(f), which clearly does not waive deportability for entry without inspection upon a false claim of citizenship. Petitioner contends that he should not be in a deportable status under Sec. 241(2)(2) of the Act since judicial construction of that section did not preclude his establishing non-deportability from the new evidence to be presented. The Board erred in using such a ground to deny his request for a remand to the Immigration Judge, for the purpose of withdrawing his earlier conceding of deportability. By leaving undisturbed his deportability from his earlier concession of deportability, he is not only being deported contrary to the clear, convincing and unequivocal standard of deportability required by Woodby v. INS, 385 U.S. 276 (1966), but he is also being denied due process of law. Moreover, he is also deprived of possible relief under Sec. 241(f) of the Act, which is denied to aliens whose deportability under Sec. 241(a)(2) of the Act has been established.

Petitioner contends that in denying him voluntary departure the Immigration Service use of a standard of "adverse factors outweighing favorable factors", the Service did not conform to its own standards, in that the Service failed to show by substantial evidence the preponderance of adverse factors over favorable factors.

ARGUMENT

I

PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE BOARD'S DENIAL OF HIS MOTION TO REOPEN THE DEPORTATION HEARING TO ENABLE HIM TO ESTABLISH HIS NON-DEPORTABILITY AT SUCH REOPENED HEARING.

Petitioner again had moved the Board on August 15, 1975 to reopen these proceedings to contest deportability. In his motion before the Board (see the complete motion papers which are included in the Administrative Record filed in this Court, as Item 3, noted in Petitioner's Appendix, p. 26A), petitioner set forth in detail and at length his arguments and contentions in support of his motion to reopen. Petitioner argued to the Board that his substantial argument in support of remanding the proceeding for a new hearing had gone unnoticed and unheeded. Even in his renewed motion of August 15, 1975, this argument was totally ignored. The failure to afford petitioner a meaningful hearing on his contentions and allegations of fact deprived him of due process of law. Japanese Immigrant Case, 189 U.S.86, 100-101(1903); Sung v. McGrath, 339 U.S.33(1950); Chew v. Colding, 344 U.S.590(1953); Greene v. McElroy, 360 U.S.474(1959); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886(1961); Pointer v. Texas, 380 U.S.400,404(1965); Smith v. Illinois, 390 U.S.129(1968); Fuentes v. Shevin,407 U.S.67(1972); Peters v. Kiff, 407 U.S.493(1972); Morrissey v. Brewer, 408 U.S.471(1972), among other "due process" cases.

Petitioner contended that the original deportation hearing, at which he was not represented by counsel, and where he conceded deportability, was accomplished in petitioner's total ignorance of the relevance to the facts and surrounding circumstances of the case of his defenses to deportation. His legal conclusory concession of deportability was made in total ignorance of the law and of the fact that upon a proper showing, by competent and relevant evidence, that deportation was not mandated by the totality of the circumstances of this case. He was prepared to sustain his burden of proof at a reopened hearing, only to be denied such opportunity by the Board in an opinion which once again totally ignored his contentions and arguments.

Petitioner did not bottom his motion to reopen upon an appeal to discretion, or by beseeching discretionary relief; rather his motion was solidly grounded in an application based upon solid legal principles and arguments, with a showing of relevant and material evidence upon which he believed that deportation was not mandated in his case. The Board, while wholly ignoring the substantial showing being made by petitioner in the renewed motion papers, prepared on petitioner's behalf by experienced immigration lawyers, retreated instead into both a misconception of petitioner's application and a reference to the earlier concession of deportability at the earlier "hearing".

The Board's decision on the renewed motion reads as follows:

"In a decision dated July 28, 1975, we dismissed the respondent's appeal from an immigration judge's order of deportation. The respondent has submitted a motion requesting that we reconsider our decision of July 28, 1975. The motion will be denied.

The respondent is a native and citizen of Trinidad who was admitted to the United States upon a wilful false claim to United States citizenship. He made an entry upon being admitted by the immigration officer at the border. Section 101(a)(13), Immigration and Nationality Act; see Matter of V-Q-, 9 I&N Dec. 78(BIA 1960). The respondent was not then inspected as an alien. See generally Matter of Wong, 11 I&N Dec. 712(BIA 1966). He was therefore correctly found deportable under section 241(a)(2) as an alien who had entered the United States without inspection. Reid v. INS, 420 U.S. 619, 624-25 (1975). Any surveillance of the respondent due to the suspicious nature of his activities does not alter the fact that he made an entry or that that entry was accomplished without inspection.

We thoroughly discussed the respondent's section 241(f) claim in our decision of July 28, 1975. The existence of fraud is irrelevant because section 241(f) does not apply to a section 241(a)(2) "entry without inspection" charge. Reid v. INS, supra.

The respondent has requested a stay of deportation. That request will also be denied.

ORDER: The motion to reconsider and the request for a stay of deportation are denied."

The Board did not deny petitioner's request as a matter of discretion or through specifically doubting his allegations. The denial was based upon an interpretation of Sec. 241(a)(2) of the Act to the effect that the Matter of Wong, 11 I&N Dec. 712 and Reid v. INS, 420 U.S. 619, 624-25, precluded the possibility of petitioner establishing non-

deportability, even if the petitioner's allegations were sustained at such reopened hearing. This was an error of law and reviewable by the Court. Liakakos v. Kennedy, D. C. 1961, 195 F. Supp. 630; Fong Sen v. INS, D. C., La., 1956, 137 F. Supp. 236, aff'd 234 F. 2d 656.

II

THERE REMAINS AN UNRESOLVED QUESTION IN REID CONCERNING POSSIBLE NON-DEPORTABILITY UNDER SEC. 241(2)(2).

Petitioner contends that on the issue of deportability under Sec. 241(a)(2) for entry without inspection on a false claim of citizenship, Reid v. INS, supra has left unresolved the question of whether the differing fact pattern sought to be established by petitioner as contained in his allegations also constitutes entry without inspection within the meaning of Sec. 241(a)(2).

Petitioner's differing fact pattern is as follows:

1. Petitioner's false citizenship claim was doubted during an exhaustive pre-entry examination. (P. 11A-12A Appendix.)
2. The Service's continuous six hours' surveillance of petitioner, at the bus depot, as described in a sworn statement of the Border Patrol Agent in his criminal complaint, would logically compel a conclusion that the decision to allow

petitioner to enter, but to keep him under close surveillance in the port area, was formulated prior to the decision to allow him to enter.

3. Petitioner's entry was not accomplished through the false claim but rather through the desire of the Service to put him under surveillance, and perhaps then to make the case against him.

Respondent's brief would make it seem that petitioner's new evidence arose because petitioner's original grounds of appeal had vanished under the Supreme Court decision in Reid, supra. Respondent completely overlooks the fact that prior to the Supreme Court's decision in Reid, the Board, the Attorney General, and all of the Courts, including this Court in Reid v. INS, 492 F.2d. 251(1974), had discussed the "entry without inspection" charge in terms of its relevance to that part of Sec. 241(f) of the Act which requires an alien to be otherwise admissible in order to obtain the statutory waiver. This Court had narrowed the issue that Sec. 241(f) required a finding of admissibility during the admission process and not to a post-hoc determination of admissibility; and that therefore deportability for entry without inspection precluded benefits under Sec. 241(f), since only a post-hoc determination could be made under such a deportation charge.

Petitioner's original request for relief under Sec. 241(f) of the Act was consistent with the law, (as the law existed at that time), and it was then unnecessary to contest deportability. (See Matter of Lee, 13 I&N dec. 214 and Reid v. INS, 492 F.2d. 251(1974)). Petitioner's later application to adjust his position to make relief contingent upon whether he was deportable as charged, by separately contesting deportability, was not an act of creating new grounds to contest deportability, but rather constituted a change in direction, necessitated by the change in the law wrought by Reid in the Supreme Court.

Petitioner also recognized that the Supreme Court's decision in Reid created a new and separate issue of non-deportability which arose from the unresolved question of Reid. Petitioner contends that he has a different fact pattern from Reid, and from other decided cases on the issue of deportability under Sec. 241(a)(2), for entry without inspection upon a false claim of citizenship.

Petitioner was quite prepared to establish the facts contained in his affidavit of August 14, 1975, (Appendix p. 11A), in a reopened hearing, and to withstand any attack against the validity and correctness, of his claim that his pre-entry examination was non-perfunctory, and that his failure to submit himself for inspection as an alien did not, by itself, accomplish his entry into the United States, or

that it frustrated the process for inspecting incoming aliens. The Board rejected his request for that opportunity, claiming that the law of Reid precluded the possibility of non-deportability on an arguably differing fact pattern.

Respondent now attacks the validity of petitioner's allegations for lack of proof, after objecting to granting him the only opportunity of an open hearing to prove his facts. (See pp. 14-15 of respondent's brief).

It is to be noted that respondent's assertion that upon entry petitioner

"had already frustrated the process of inspection required of all aliens by 8 U.S.C. 1225, even to this date the authorities have not had the opportunity to ascertain whether or not Mitchell is excludable, 8 U.S.C. Sec. 1225, 8 CFR Part 235". (p. 15, supra).

is totally incorrect since the Border Patrol Agent claimed in his sworn statement that he had determined petitioner to be excludable on August 5, 1974, approximately six hours after entry. (Appendix 21A). This allegation should be tested at a litigated hearing to determine its bona fides. Respondent conceded at p. 3 of its brief that Mitchell's excludability was allegedly established after his questioning in front of bus depot, after entry but within the port area.

Petitioner submits that if his claimed fact pattern was established conclusively at a reopened hearing, his non-

deportability as charged would be distinguishable from the established deportability as charged in the Reid case, and upon decisions which Reid had adopted. The distinguishability of non-deportability would be with respect to the fact that entry without inspection under a false claim of citizenship was considered sustained because in those cases the failure to submit themselves for inspection as aliens had completely insulated them from the inspection required by Sec. 235 of the I&N Act for all alien ; and therefore their entries were in effect without inspection.

Petitioner contends that Reid and its antecedents did not hold that failure to present oneself as an alien for inspection would ipso facto render him deportable for entry without inspection under a false claim of citizenship. Failure to present oneself as an alien for inspection is not, in itself, a deportable provision of law and it is a particular instance of the general failure to present oneself for inspection which is punishable by deportation under Sec. 241(a) (2) of the I&N Act. For that reason it is mentioned as an allegation of fact in the Order to Show Cause. (p. 1A, Appendix). By thwarting meaningful inquiry as to excludability as an alien, by the significant frustration of the alien inspection process, and by actually accomplishing entry, the overt act of failure to admit alienage sustains a charge under Sec. 241(a) (2), the provision of law punishing entry without the inspection required of all aliens by Sec. 235 of the Act.

Petitioner believes that Reid and its antecedents did hold that the reason why a false claim of citizenship constitutes a deportable offense, as entry without inspection pursuant to Sec. 241(a)(2) of the Act, is because of the actual co-existence of the following factors together with the factor of an alien's failure to submit himself as an alien for inspection:

1. Acceptance, prior to entry, of a false citizenship claim.
2. The acceptance had thwarted meaningful inquiry as to excludability as an alien.
3. The thwarting of meaningful inquiry had frustrated the process of inspection required of all aliens by Sec. 235 of the Act, 8 U.S.C. 1225.

Petitioner submits that his earlier concession of deportability would sustain deportability under Sec. 241(a)(2) of the Act, since the above three factors would be established by what he conceded. However, in a reopened hearing he would establish that these three factors did not co-exist with his failure to submit himself as an alien, and consequently would establish his non-deportability.

Petitioner's claim as to the important ratio decidendi of the rule of law enunciated in Reid and its antecedents is found in the following excerpts:

In Reid v. INS, supra, the Court wrote as follows:
(emphasis supplied)

" The INS seeks to deport petitioners under the provisions of 241(a)(2), asserting that they entered the United States without inspection. Petitioners dispute none of the factual predicates upon which the INS bases its claim, but instead argue that their case is saved by the provisions of 241(f), which provides in pertinent part as follows:

Section 241(a)(2) establishes as a separate ground for deportation, quite independently of whether the alien was excludable at the time of his arrival, the failure of an alien to present himself for inspection at the time he made his entry. If this ground is established by the admitted facts, nothing in the waiver provision of Sec. 241(f), which by its terms grants relief against deportation of aliens 'on the ground that they were excludable at the time of entry,' has any bearing on the case. Cf. Costanzo v. Tillinghast, 287 U.S. 341, 343, 53 S.Ct. 152, 153, 77 L.Ed. 350 (1032).

The issue before us, then, turns upon whether petitioners, who accomplished their entry into the United States by falsely asserting that they were citizens of this country, can be held to have 'entered the United States without inspection'. Obviously not every misrepresentation on the part of an alien making an entry into the United States can be said to amount to an entry without inspection. But the courts of appeals have held that an alien who accomplishes entry into this country by making a wilfully false representation that he is a United States citizen may be charged with entry without inspection. Ex parte Saadi, 26 F.2d. 458 (A9 1928), cert. denied, 278 U.S. 616, 49 S.Ct. 21, 73 L.Ed. 540; Volpe v. Smith, 62 F.2d. 808 (CA7), aff'd on other grounds, 289 U.S. 422, 424, 53 S.Ct. 665, 666, 77 L.Ed. 1298 (1933); Huie v. INS, 349 F.2d. 1014 (CA9 1965). We agree with these holdings, and conclude that an alien making an entry into this country who falsely represents himself to be a citizen would not only be excludable under Sec. 212(a)(19) if he were detected at the time of his entry, but has also so significantly frustrated the process for inspecting aliens that he is also deportable as one who has 'entered the United States without inspection.'

In reaching this conclusion we subscribe to the reasoning of Judge Aldrich, writing for the Court of Appeals for the First Circuit in Goon Mee Heung v. INS, 380 F.2d. 236, 237 (CA1 1967), Cert. denied, 389 U.S. 975, 88 S.Ct. 479, 19 L.Ed. 2d 470 (1968):

'Whatever the effect other misrepresentations may arguably have on an alien's being legally considered to have been inspected upon entering the country, we do not now consider; we are here concerned solely with an entry under a fraudulent claim of citizenship.

Aliens who enter as citizens, rather than as aliens, are treated substantially differently by immigration authorities. The examination to which citizens are subjected is likely to be considerably more perfunctory than that accorded aliens. Gordon & Rosenfeld, Immigration Law and Procedure Sec. 316d (1969). Also, aliens are required to fill out alien registration forms, copies of which are retained by the immigration authorities. 8 C.F.R. Sec. 235.4, 264.1; 8 U.S.C. Sec. 1201(b), 1301-1306. Fingerprinting Sec. 1201(b), 1301-1302. The net effect, therefore, of a person's entering the country as an admitted alien is that the immigration authorities, in addition to making a closer examination of his right to enter in the first place, require and obtain information and a variety of records that enable them to keep track of the alien after his entry. Since none of these requirements is applicable to citizens, an alien who enters by claiming to be a citizen has effectively put himself in a quite different position from other admitted aliens, one more comparable to that of a person who slips over the border and who has, therefore, clearly not been inspected.'"

In the above-quoted excerpt from Reid, the deportability issue under Sec. 241(a)(2) is intermingled with the related issue of waiver of deportability under Sec. 241(f). As to the deportability issue, it appears that the Court decided as follows:

The Reids did not dispute any of the factual predicates upon which INS based its claim of deportability and their admissions had established the deportable ground of entry without inspection on a false claim of citizenship under Sec. 241(a)(2) of the Act. This is a deportable ground because the literal inspection which occurs when an alien fails to submit himself, as an alien, for inspection, is not the inspection contemplated by Sec. 235 of the I&N Act since meaningful inquiry as to excludability as an alien is thwarted during such an "inspection" and the actual inspection process for aliens is significantly frustrated.

There is no indication that the Court stated or implied that failure to admit alienage ipso facto renders one deportable for entry without inspection. The possible conclusions as to such deportability may have resulted from the following statement in Reid p. 1167:

"....Sec. 241(a)(2) establishes as a separate ground for deportation the failure of an alien to present himself for inspection at the time he made his entry"

This statement, however, must be read in the context of the explanations quoted on p. 1168, supra, and which show that "failure to present oneself for inspection" is a deportable offense because the literal "inspection" which occurs when an

alien fails to submit himself, as an alien, for inspection, is not the inspection required by Sec. 235 of the Act. Meaningful inquiry as to excludability as an alien is thwarted during such an "inspection" and the actual inspection process for aliens is significantly frustrated.

Petitioner considers it highly significant that in the Order to Show Cause "failure to present oneself as an alien", or the equivalent thereof, is mentioned as an allegation of fact and not as a deportable provision of law. It is to be noted also that Sec. 235 of the Act requires that citizens as well as aliens must present themselves for inspection, but Sec. 235 carries no direct sanctions either for the citizen or the alien who fails to present himself as required. (See Gordon & Rosenfeld p. 3-93, Vol. I). However, aliens who violate Sec. 235 of the Act are punishable under Sec. 241(a) (2) for entry without inspection. (Gordon & Rosenfeld p. 3-93, Vol. I).

A finding of fact as to the correctness of the allegation, that the alien failed to present himself as an alien, has always satisfied the conclusion of law that entry without inspection occurred. Because of this, the allegation of fact has come to be regarded as part of the conclusion of law itself and creates the erroneous impression that the correctness of the allegation ipso facto creates entry without inspection. What has been overlooked is the fact that the conclusion of law, as to entry without inspection, rests upon the rationale which

results from the fact that the inspection process for aliens is found to have been significantly frustrated.

Meaningful inquiry as to excludability as an alien was thwarted through the acceptance of the false citizenship claim which was made at time of entry of the alien. Petitioner asked the Board for an opportunity to distinguish his case by establishing that his false citizenship claim was not actually accepted at the time he was permitted by the Service to enter the port area and that there was only an appearance of a frustration of the inspection process by his false citizenship claim.

The Board overlooked the fact that the Reids had never put in issue the crucial questions which petitioner put in issue in his motion before them, dated August 15, 1975, (listed as Item 3 in the Administrative Record.) Since the contentions raised by petitioner are not necessarily controlled by the decision in Reid, and when the Board summarily rejected petitioner's arguments, through an incorrect interpretation of Reid, failure to grant petitioner a hearing on his allegations of fact deprived him of due process of law. By the finality of the Board's decision rendered September 18, 1975, petitioner has been bereft of any opportunity to establish his differing fact pattern, which would be germane to the conclusion of law that he is not deportable pursuant to the specific charge brought against him.

Petitioner submits that, in the decided cases preceding

the Supreme Court's decision in Reid, there was never put in issue the crucial and differing fact pattern which he put in issue by his motion of August 15, 1975. All of the decided cases sustaining the charge of entry without inspection, on a false claim of citizenship, turned on the fact that the claims made were accepted and such acceptance thwarted meaningful inquiry as to excludability as an alien. Thus it resulted in a significant frustration of the inspection process for aliens required by Sec. 235 of the Act. The issue in those cases was whether "inspection" as a citizen was a defense against a charge of entry without inspection. (Ex parte Saadi, 26 F.2d 458 (A9 1928), cert. denied, 278 U.S. 616, 49 S.Ct. 21, 73 L.Ed. 540; Volpe v. Smith, 62 F.2d. 808 (CA7), aff'd. on other grounds, 289 U.S. 422, 53 S.Ct. 665, 666, 77 L.Ed. 1298 (1933); Huie v. INS, 349 F.2d. 1014 (CA9 1965); Matter of C-V, 1 I&N Dec. 385).

There was never put in issue in any of those cases questions with respect to a non-acceptance of the citizenship claim, and no thwarting of meaningful inquiry and no significant frustration of the inspection process for aliens. When the Board deprived petitioner of his last chance to establish "non-acceptance", "non-thwarting" and "non-frustrating" of the process, by relying on an incorrect interpretation of the law it acted to forestall petitioner in making his claim to contest deportability. The Board erred as a matter of law by denying petitioner his opportunity to prove his claim. Petitioner should even now be

given that opportunity by a remand for further administrative proceedings, to enable him to establish the germane facts which he has alleged, and which are strongly suggested from the circumstances of a continuous surveillance as described in the sworn statement of the Border Patrol Agent. (P. 25A of the Appendix, Item 9 Index to Administrative Record.)

Petitioner respectfully submits that the final order of the Board of Immigration Appeals involved mixed questions of fact and law, and that the Board erred in its interpretation of the law as to the impossibility of petitioner establishing his non-deportability in a reopened hearing. The Board's order refusing to reopen the deportation proceedings was a violation of due process of law and reflected a loose construction of Sec. 241(a)(2), contrary to the Supreme Court's mandate requiring strict construction of the specific deportation charge found in the Order to Show Cause. Fong Hau Tan v. Phelan, 338 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed 433 (1948); INS v Errico, 385 U.S. 214, 225, 87 S.Ct. 473, 17, L.Ed. 2d. 318 (1966); Barber v. Gonzalez, 347 U.S. 637, 642-643.

III

PETITIONER'S WAIVER OF DEPORTABILITY
UNDER SEC. 241(f) IS CONTINGENT UPON
THE OUTCOME OF HIS ESTABLISHING
NON-DEPORTABILITY UNDER SEC. 241(a)(2)

Petitioner reiterates the dependency of relief under Sec. 241(f) upon the outcome of his non-deportability under Sec. 241(a)(2) of the Act and respectfully incorporates herein

by reference the arguments submitted in his main brief, at p. 27.

Respondent in its brief has cited many precedents on the issue of Sec. 241(f) relief; but only Perreira-Barreira v. U. S. Dept. of Justice, 523 F.2d. 503 (2d. Cir. 1975) is possibly relevant. This Court had been presented with the issue of the self-sufficiency of the deportable charge, as it related to reliance on the element of fraud. This Court did not rule on the merits of that argument, for the reasons that the fact pattern did not show any reliance on the element of fraud. Therefore petitioner's contentions are not foreclosed by Perreira-Barreira, supra.

IV

THE ISSUE PRESENTED FROM DENIAL OF MITCHELL'S APPLICATION FOR VOLUNTARY DEPARTURE IS WHETHER THE FINDINGS OF PREPONDERANCE OF ADVERSE FACTORS SHOULD NOT BE SET ASIDE FOR LACK OF SUBSTANTIAL EVIDENCE, WITHIN THE PURVIEW OF 5 U.S.C. 706(2)(E)

Respondent in its brief (p. 18) has stated that the sole issue presented upon the denial of Mitchell's application for voluntary departure is whether or not the Board of Immigration Appeals abused their discretion in denying that relief. Petitioner does not request review for abuse of discretion within the purview of paragraph (A) of 5 U.S.C. 706(2) but within the purview of paragraph (E) of that section. In fact, petitioner does not question the validity of the policy or the rational basis for the formula utilized for exercising discretion. That

policy is one in which the outweighing of favorable factors by adverse factors is considered justifiable to deny voluntary departure. Petitioner asserts that there is only a scintilla of evidence concerning the three adverse factors relied upon by the Board and respondent has not filled its own prescription for exercising discretion in this case.

Petitioner asks this Court to review the substantiality of the evidence upon which the Board relied, when applying its policy for exercising discretion, a policy with which petitioner does not argue. The "substantial evidence" which must support administrative agency findings and conclusions in a hearing must be more than a scintilla. (See Scanland v. U. S. Army Test and Evaluation Command, Dept. of Army, D. C. Md. 1975, 389 F. Supp. 65).

Respondent in its brief (p.19) would make it appear that there were more than three adverse factors upon which the Board relied to deny voluntary departure. The three actual factors were as follows: (See Appendix p. 20A, Item 7 Index to Administrative Record, Appendix 27A).

1. Mitchell's use of a fraudulent birth certificate was neither innocent nor inadvertent.
2. Mitchell had failed to pay his income tax for 1973.
3. It was highly probable that Mitchell had committed adultery on his trip to Canada.

The evidentiary value of the deliberateness of petitioner's false citizenship claim must be completely discounted. "Deliberateness"

is a prime essential in establishing deportability under Sec. 241(a)(2). Innocent and inadvertent false claims of citizenship do not result in deportability. (Zimmerman v. Lehman, 339 F.2d. 943 (7th Cir. 1965)). However, Sec. 241(a)(2) is not one of the deportable categories in respect of which voluntary departure is statutorily precluded. (See Sec. 244(e) of the Act, 8 U.S.C. 1254(e)). Respondent cannot use the deportable ground itself to deny relief from deportation. The transcript of the deportation hearing (Item 20, Index to Administrative Record) does not disclose anything more than a mere scintilla of evidence with respect to respondent's claim as to petitioner's failure to pay income tax for 1973. The evidence indicates nothing more than an assertion by petitioner on August 6, 1974 that his attorney, James B. Biester, requested as extension of time beyond the due date of April 15, 1974. (P. 16 trial transcript - petitioner's appendix 8A). The Immigration Judge never disputed petitioner's assertion, specifically about the request for an extension of time to file his tax, except to comment: "Why didn't you file? Instead of buying a Mercedes, why didn't you pay your income tax? (P. 8A petitioner's appendix) (emphasis supplied).

The transcript of the deportation hearing does not disclose anything more than a mere scintilla of evidence with respect to respondent's claim that it was highly probable that petitioner committed adultery on the week-end trip to Canada. There was no evidence developed at the deportation hearing to

suggest, affirmatively, that adultery was "highly probable". Such a conclusion and finding as to high probability of adultery is unsupported by the evidence.

Petitioner submits that the Service policy is to consider as favorable factors bona fide marriage to a United States citizen, long-term residence even while out of status, and parentage of United States citizen children. (See O.I. 242.10(a), O.I. 244.2(g) under 8 CFR, Sec. 244(a)(1) I&N Act. 8 U.S.C. 1254(a)(1).) The above favorable factors were considered outweighed by allegedly adverse factors which were never established pursuant to substantial evidence, on the record.

Respondent in its brief has cited several Court cases in support of non-abuse of administrative discretion. Petitioner did not allege "abuse of discretion". "Abuse of discretion" and "substantial evidence" are separate and independent grounds for review. Arkansas-Best Freight System, Inc. v. U. S., D. C. Ark. 1973, 364 F. Supp. 1239, reversed on other grounds 95 S.Ct. 438, 419 U.S. 281, 42 L.Ed. 2d. 447, rehearing denied 95 S.Ct. 1340, 1341. The Court must hold unlawful and set aside administrative agency action, findings and conclusions found to be unsupported by substantial evidence. (Braniff Airway Inc. v. C. A. B. 1967, 379 F.2d. 453, 126 U.S. App. D.C. 399.) Since the Board utilizes a discretionary formula of "adverse factors outweighing favorable factors", the alleged preponderance of "adverse" over "favorable" must be substantiated by more than a mere scintilla of evidence on the record.

The substantial evidence test is applicable to a deportation hearing at which discretionary relief is requested pursuant to provisions of 8 CFR 242.17(b).

CONCLUSION

Petitioner is at present diligently pursuing an immigrant visa for which he is otherwise eligible except for the order of deportation incorrectly outstanding against him. Whether that order of deportation should continue to exist is a question to be decided upon the merits of the sustainability of the specific charges brought or to be brought against him by the Service.

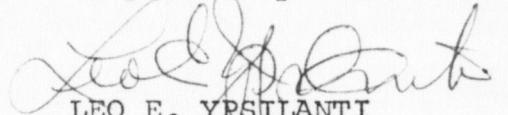
The availability of other relief or the possibility that petitioner would be deportable on other grounds should not be the criteria for determining petitioner's present deportability or discretionary relief from present deportability.

WHEREFORE, petitioner prays that:

1. His proceedings be remanded for a hearing on
 - (a) his non-deportability;
 - (b) possible relief from deportation under Sec. 241(f).
2. In the alternative, the Court should set aside the denial of voluntary departure on the grounds

that the findings and conclusions were not
supported by substantial evidence.

Respectfully submitted


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Attorney for Petitioner

Dated: March 23, 1976

COPY RECEIVED

Robert B. Fiske Jr.
UNITED STATES ATTORNEY

3/23/76

M J Bryant